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Citation for final published version:

Pereira, Ricardo ORCID: <https://orcid.org/0000-0003-2087-3004> 2021. Public participation, indigenous peoples' land rights and major infrastructure projects in the Amazon: the case for a human rights assessment framework. Review of European, Comparative & International Environmental Law 30 (2), pp. 184-196. 10.1111/reel.12400 file

Publishers page: <https://doi.org/10.1111/reel.12400>
<<https://doi.org/10.1111/reel.12400>>

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Public participation, indigenous peoples' land rights and major infrastructure projects in the Amazon: The case for a human rights assessment framework

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Abstract

The recognition of land title and demarcation of indigenous peoples' ancestral lands and the guarantee of the rights of consultation and free, prior and informed consent in the context of large infrastructure projects represent some of the major challenges for indigenous peoples and communities in the Amazon States. These challenges have been exacerbated by the election of the current Brazilian federal government in power since January 2019. Yet a significant development with the potential to strengthen participatory environmental governance in the region followed the adoption and entry into force in April 2021 of the 2018 Regional Agreement on Access to Environmental Information, Public Participation and Access to Justice in Latin America and the Caribbean. This article will argue that national environmental impact assessment and licensing procedures must integrate a human rights approach to project impact assessments to safeguard the protection of the environment and indigenous peoples' fundamental rights.

1 | INTRODUCTION

The recognition of land title and demarcation of indigenous peoples' ancestral lands and the guarantee of the rights of consultation and free, prior and informed consent (FPIC) in the context of large infrastructure projects represent some of the major challenges for indigenous communities in the Amazon States. Regrettably, indigenous cultures are still viewed today by some governments as barrier to economic development. Most Amazon States have introduced legislation requiring consultation and, in more limited circumstances, indigenous peoples' prior and informed consent in their federal legislation concerning the planning stages of development projects. However, the levels of effectiveness of implementation vary considerably between countries in the region.¹

¹See MA Tigre and S Slinger, 'Voice in the Development of Amazonia: The Constitutional Rights to Participation of Indigenous Peoples' in W Leal Filho, VT King and I Borges de Lima (eds), *Indigenous Amazonia, Regional Development and Territorial Dynamics: Contentious Issues* (Springer 2020) 7.

In the case of Brazil,² the lack of meaningful and culturally appropriate consultation and FPIC evidences the country's non-implementation of international obligations, in particular, the requirements for consultation established under the 1969 Inter-American Convention on Human Rights,³ the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples Rights,⁴ as well as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵

²There are 305 indigenous ethnic groups and over 274 different indigenous languages in Brazil, with a total of nearly 900,000 individuals (or 0.47 percent of the Brazilian population) who identify as indigenous. The vast majority of indigenous reserved land (98.5 percent) is located in the Amazon. See <<https://www.iwgia.org/en/brazil.html>>.

³American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

⁴Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention 169).

⁵UNGA 'Declaration on the Rights of Indigenous Peoples' UN Doc A/RES/61/295 (2 October 2007) (UNDRIP).

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This article aims to assess the challenges posed by weaknesses in the existing legal framework applicable to indigenous peoples' participation in the planning and post-planning stages of development projects in the Brazilian Amazon.⁶ The article examines whether the current legal framework enables the effective protection and assertion of indigenous peoples' land and environmental rights and the extent to which international and regional human rights law can provide effective remedies for human rights violations faced by indigenous peoples in the Brazilian Amazon. Moreover, this article highlights the particular challenges facing the protection of indigenous peoples' rights since the election of the current Brazilian federal government. The current government has been marked by anti-environment and anti-indigenous rhetoric, as reflected in the adoption of regressive laws and policies, leading to increases in deforestation rates by expanding plantations of soy and other export crops, and building of new roads, dams and mines and the desire to open indigenous lands to agribusiness and miners.⁷

The article argues that environmental impact assessment (EIA) and licensing procedures must incorporate a human rights-based framework to safeguard the protection of indigenous peoples' fundamental rights. Accordingly, achieving and maintaining a social licence to operate requires an ongoing process of community engagement aimed at achieving and building trust relationships with the impacted communities with the overriding goal of reaching meaningful consultation and FPIC.⁸ Moreover, a human rights impact assessment (HRIA) framework would seek to ensure that projects designed to expand access to natural resources are conceived, planned and implemented with the objective of protecting, respecting and fulfilling human rights in the Brazilian Amazon⁹ in line with the principles of due diligence in corporate decision making, effective remedies and access to justice as set out in the 2011 United Nations (UN) Guiding Principles on Business and Human Rights.¹⁰ An HRIA aims to integrate human rights principles such as non-discrimination, meaningful participation, transparency and accountability into the project planning and decision making.¹¹ Although HRIA draws on impact assessment practices such as environmental, social and health impact assessment, there are important differences between them. For example, while in many

jurisdictions public participation tends to be a standard requirement in impact assessment processes such as EIA and social impact assessment (SIA), a human rights-based approach creates further emphasis on participation in terms of questioning, broadening the points in time at which participation occurs, the level of information sharing involved in participation and consultation activities and empowerment and capacity building of individuals to participate in the impact assessment process.¹²

The argument advanced by this article has significant implications for the advancement of human rights of indigenous peoples' rights not only in the Amazon but also in other regions, particularly concerning the protection of sites of high ecological and biodiversity significance. A human rights-based framework creates the essential procedural mechanisms required for the exercise of indigenous peoples' right to self-determination and sustainable management of natural resources. By aiming to incorporate effective and meaningful participatory rights in project impact assessments, a human rights approach would secure the sustainable living and community engagement in project planning and post-planning stages, building a relationship of trust between local and indigenous communities and project developers, the empowerment of local actors and capacity building aimed at preventing human rights violations and environmental harms associated with project development. Moreover, a HRIA framework would enable grievances to be addressed at an earlier stage of project development and thereby reducing the reputational and economic risks of companies, governments and financial institutions associated with litigation and civil society campaigns.

The article is structured as follows. Section 2 discusses the drivers for deforestation in the Amazon and the extent to which they impact on indigenous peoples' land rights in Brazil. Section 3 turns attention to the development and application of the rights to participation, consultation and to FPIC in Brazil. Section 4 presents one specific case study – the deeply criticized and controversial construction of the Belo Monte dam in the Brazilian state of Para in the Amazon basin region – to illustrate the deficiencies in Brazil's implementation of international minimum standards for indigenous participation, consultation and FPIC rights. Section 5 compares Brazil's legislative framework with similar instruments concerning public consultation and FPIC in two other Amazon States (Peru and Colombia) and discusses how far the adoption of the 2018 Regional Agreement on to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)¹³ may improve participatory environmental governance in the region. Section 7 concludes.

⁶See VO Mazzuoli and SM Galvão, 'A proteção internacional do meio ambiente no Tratado de Cooperação Amazônica' (Thomson Reuters 2011) 39.

⁷L Ferrante and PM Fearnside, 'Brazil Threatens Indigenous Lands' (2020) 368 Science 481.

⁸P Hanna and F Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013) 31 Impact Assessment and Project Appraisal 146.

⁹See DS Olawuyi, 'Energy (and Human Rights) for All: Addressing Human Rights Risks in Energy Access Projects' in R Salter, CG Gonzalez and EA Kronk Warner (eds), *Energy Justice: US and International Perspectives* (Edward Elgar 2018) 73; and D Shelton, 'Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change' in S Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2010) 91.

¹⁰Office of the High Commissioner for Human Rights (OHCHR), 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf> Principles 4, 15(b) and 17.

¹¹See World Bank, 'Human Rights Impact Assessment: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (World Bank 2013).

¹²Danish Institute for Human Rights, 'Human Rights Impact Assessment: Guidance and Toolbox' (2020) <https://www.humanrights.dk/sites/humanrights.dk/files/media/document/DIHR%20HRIA%20Toolbox_Welcome_and_Introduction_ENG_2020.pdf>.

¹³Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) <<https://www.cepal.org/en/escazuagreement>> (Escazú Agreement).

2 | THE DRIVERS FOR DEFORESTATION IN THE AMAZON REGION AND THEIR PRESSURES ON INDIGENOUS PEOPLES AND LOCAL COMMUNITIES' LAND RIGHTS

Historically, as well as in contemporary times, the Brazilian development model has been based on heavy industrialization and dependence on natural resources. Infrastructural improvements allowed both easier access to the forest and the cheaper transportation of goods produced in the Amazon, therefore, driving large-scale agricultural activity. There is a direct correlation between the decreasing costs of transportation between the Amazon and the rest of Brazil and the increasing rates of deforestation.¹⁴ The federal government has adopted a number of schemes to fund development-oriented projects, including *Avança Brasil*, a package of 338 projects throughout Brazil that has raised US\$ 43 billion to fund the building of roads, hydroelectric dams and other infrastructural developments to be implemented in the period between 2000 and 2020.¹⁵ The building of roads and highways – such as the Trans-Amazonia highway that cuts across Amazonia – facilitated access to markets and created further incentives for clearing of land. The National Energy Plan 2050 (*Plano Nacional de Energia 2050*) launched by the Ministry of Mining and Energy in December 2020 foresees the construction of further hydroelectric projects, and some of these plans extend to energy provision to neighbouring Amazon States.¹⁶

One of the most significant drivers for land-use change in Brazil is agricultural production. Brazil is the world's largest producer of soy (overtaking the United States (US) in March 2020) and second-largest producer of beef (after the US).¹⁷ Cattle ranching is widely regarded as the largest direct driver of deforestation in the Amazon region,¹⁸ representing about two-thirds of annual deforestation¹⁹ and 75 per cent of deforested areas of the Amazon.²⁰ Mining activities also put significant pressure on land planning and the environment. With the discovery of gold deposits in the Amazon in the 1980s, there has been an increase in landless workers acting as

small-scale surface miners or prospectors (*garimpeiros*) leading to conflicts with indigenous communities.²¹

It has been estimated that 17 per cent of the Brazilian Amazon's original forest cover had been cleared by 2003.²² A substantial decline from historically high deforestation rates in the Amazon occurred from 2004 to 2012, which can be partly attributed (particularly after 2007) to the Plan for Prevention and Control of Deforestation in the Legal Amazon (PPCDAm),²³ and partly to economic factors such as commodity prices and the currency exchange rates that affect the profitability of agricultural exports.²⁴ After 2012, deforestation accelerated significantly despite control efforts.²⁵ For example, increases in deforestation rates have been reported in the period between September 2014 and January 2015, with deforestation rates in that period more than doubling in relation to those same months a year earlier.²⁶ According to InfoAmazônia, some of the factors that contributed to the increased deforestation rates after 2013 include reduction in nature conservation areas, the slowdown in demarcation of indigenous lands, the weakness of environmental agencies and low investment in the PPCDAm budget 2011–2014.²⁷ Research conducted by the Amazon Environmental Research Institute suggests that the Amazon forest fires in 2019–2020 can only be explained by the increase in deforestation.²⁸ Of particular concern was the data released by the Brazilian National Institute for Space Research (INPE) in late 2019 with evidence from satellite imagery showing a 76 per cent increase in deforestation compared to the same period in 2018.²⁹ The exact scale of deforestation in the rainforest became clear following the publication of the official 2019–2020 figures by INPE, which suggested that there has been a significant rise already compared to 2018.³⁰ The COVID-19 pandemic has led to further weakening of both environmental legislation and enforcement and has

¹⁴PM Fearnside, 'Deforestation in Brazilian Amazonia: History, Rates and Consequences' (2005) 19 *Conservation Biology* 680.

¹⁵PM Fearnside, 'Avança Brasil: Environmental and Social Consequences of Brazil's Planned Infrastructure in Amazonia' (2002) 30 *Environmental Management* 735.

¹⁶Peru and Bolivia in particular. See 'Plano Nacional de Energia 2050' (2020) <<https://www.epe.gov.br/pt/publicacoes-dados-abertos/publicacoes/Plano-Nacional-de-Energia-2050>>; and <<https://www.gov.br/pt-br/noticias/energia-minerais-e-combustiveis/2020/12/plano-nacional-de-energia-2050-e-lancado>>.

¹⁷See Statista, 'Leading Soybean Producing Countries Worldwide from 2012/13 to 2020/21' <<https://www.statista.com/statistics/263926/soybean-production-in-selected-countries-since-1980/>>; and EKHJ zu Ermgassen et al, 'The Origins, Supply Chain and Deforestation Risk of Brazil's Beef Exports' (2020) 117 *Proceedings of the National Academy of Sciences of the United States of America* 31770. See also D Boucher et al, 'The Root of the Problem: What's Driving Tropical Deforestation Today?' (Union of Concerned Scientists 2011).

¹⁸D Nepstad, CM Stickler and OT Almeida, 'Globalization of the Amazon Soy and Beef Industries: Opportunities for Conservation' (2006) 20 *Conservation Biology* 1595.

¹⁹*ibid.* See also D Nepstad et al, 'The End of Deforestation in the Brazilian Amazon' (2009) 326 *Science* 1350.

²⁰See MMC Bustamante et al, 'Estimating Greenhouse Gas Emissions from Cattle Raising in Brazil' (2012) 115 *Climatic Change* 559; S Margulis, 'Causes of Deforestation of the Brazilian Amazon' (World Bank 2003).

²¹M Schmink and C Wood, *Contested Frontiers in Amazonia* (Columbia University Press 1992).

²²Margulis (n 20).

²³Plan for Prevention and Control of Deforestation in the Legal Amazon (PPCDAm) <<http://redd.mma.gov.br/en/legal-and-public-policy-framework/ppcdam>>. The legal Amazon comprises 'the states of Acre, Pará, Amazonas, Roraima, Rondônia, Amapá and Mato Grosso and the regions located north of the 13th parallel south in the states of Tocantins and Goiás and west of the 44th meridian west in the state of Maranhão'; Law 12.651/2012 (Forest Code) art 3(1).

²⁴TAP West and PM Fearnside, 'Brazil's Conservation Reform and the Reduction of Deforestation in Amazonia' (2021) 100 *Land Use Policy* 105072.

²⁵*ibid.*

²⁶Interview with Philip Fearnside in R Schiffman, 'What Lies Behind the Recent Surge of Amazon Deforestation' (Yale Environment 360, 9 March 2015).

²⁷InfoAmazônia, 'A Política do Desmatamento' (2015) <<http://desmatamento.infoamazonia.org/analise/>>; HS Ferreira, DA Serraglio and RL Maganhati Mendes, 'Activity of the Brazilian Judiciary in the Amazon and Cerrado Biomes Aimed at Combating Global Warming' in C Voigt and Z Makuch (eds), *Courts and the Environment* (Edward Elgar 2018) 113.

²⁸Amazon Environmental Research Institute, 'Amazon Deforested Area to be Burned in 2020 May Exceed 4.5 Thousand km²' (8 June 2020) <<https://ipam.org.br/amazon-deforested-area-to-be-burned-in-2020-may-exceed-4-5-thousand-km2/>>.

²⁹See INPE, 'Programas Instituto Nacional de Pesquisas Espaciais' <<http://queimadas.dgi.inpe.br/queimadas/portal-static/situacao-atual/>>.

³⁰See *ibid.*; T Phillips, 'Amazon Deforestation Surges to 12-year High under Bolsonaro' (The Guardian, 30 November 2020).

contributed to further increases in deforestation in the Amazon in 2020.³¹ Unfortunately, indigenous lands have been disproportionately impacted by high rates of deforestation in the Amazon. The land of the Ituna-Itatá indigenous group living in voluntary isolation in the Amazon was the most deforested indigenous land in Brazil in 2019, with 120 km² of forests cleared, a figure six times higher than the Kayapó Indigenous Territory, which was the group second-most affected by the high rates of deforestation.³²

3 | INDIGENOUS PEOPLES' LAND RIGHTS AND CONFLICTS OVER LAND TENURE IN BRAZIL

The various pressures on land use and drivers for deforestation significantly undermine indigenous peoples' land rights in Brazil. In the past few decades, indigenous peoples' land rights recognized under international law and the Brazilian 1988 Constitution³³ have been compromised by a series of Brazilian laws and policies aimed at advancing agrarian reform and economic development.³⁴

Historically, *uti possidetis juris* has been raised as a legal basis for the expropriation of indigenous lands based primarily on concepts of effective occupation of land.³⁵ The adoption of the Brazilian Constitution was a landmark development for the protection of indigenous peoples' rights in the country and has been praised for largely breaking away from the integrationist stance of previous domestic laws.³⁶ Those advances in indigenous peoples' constitutional rights can be partly attributed to the work of the indigenous delegations who provided strong lobbying, supported by the Catholic Church, before Congress in the negotiation process of the Constitution that started in February 1987.³⁷ However, it is notable that the drafting process of the Constitution was marked by a lack of

indigenous peoples' participation and direct representation in Congress.³⁸

Although the Brazilian Constitution states that 'those lands traditionally occupied by the Indians belong to the Brazilian State',³⁹ Chapter 8 of the Constitution – which is dedicated to the rights of indigenous peoples – states that indigenous lands are 'inalienable and untransferable' and the rights thereto are not subject to statute of limitation.⁴⁰ Moreover, Article 231 of the Constitution states that indigenous peoples shall have 'their original rights to the lands they traditionally occupy'⁴¹ and that they 'shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein'.⁴² The Constitution also adds an important environmental dimension to indigenous property rights by linking the exercise of indigenous land rights to the preservation of the natural environment.⁴³ It was only following difficult negotiations and a compromise between political parties that the adopted text of the Constitution does not deny the indigenous constitutional rights and guarantees to 'acculturated Indians'.⁴⁴ Indigenous peoples' land rights are also enshrined in Brazilian secondary legislation, which provides them with a regime of autonomy and self-government. Under Article 22 of the 'Indian Statute' (*Estatuto do Índio*),⁴⁵ indigenous peoples who have permanent possession of the lands that they inhabit also have exclusive usufruct rights concerning natural resources and all existing utilities within those lands. It is also recognized that indigenous peoples may apply their traditional laws in the management of their lands.

Brazil ratified ILO Convention 169 on 22 July 2002,⁴⁶ and is one of the signatories of the UNDRIP. ILO Convention 169 is the only legally binding international agreement specifically aimed at giving effect to indigenous peoples' rights currently in force. The Convention provides for recognition of indigenous land tenure systems, which typically are based on customary rules. Article 14(1) of the Convention affirms that 'the rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised' and that 'measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities'.⁴⁷ The UNDRIP similarly aims to protect indigenous land and

³¹Data from INPE: <<http://terrabrasilis.dpi.inpe.br/app/dashboard/alerts/legal/amazon/daily/>>; See MM Vale et al, 'The COVID-19 Pandemic as an Opportunity to Weaken Environmental Protection in Brazil' (2021) 255 Biological Conservation 108994. See further MA Tigre, 'COVID-19 and Amazonia: Rights-Based Approaches for the Pandemic Response' (2021) 30 Review of European, Comparative and International Environmental Law.

³²Vale et al (n 31).

³³Brazilian Federal Constitution 1988 (Brazilian Constitution).

³⁴See in particular the Land Statute, Law 4.504 of 30 November 1964; the National Institute for Colonization and Agrarian Reform created by Decree 1.110 of 9 July 1970; and the reforms introduced to the Forest Code, Law 12.651 of 25 May 2012.

³⁵For a discussion of the implications of *uti possidetis juris* for indigenous peoples' land rights in Latin America, see further B García, *The Amazon from an International Law Perspective* (Cambridge University Press 2011) 51–54. See generally MN Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 British Yearbook of International Law 75.

³⁶S Rodrigues Pinto and AC Zema de Resende, '30 Anos da Constituição Federal Brasileira – Direitos dos Povos Indígenas sob Ameaça' in L de Oliveira Xavier, C Dominguez Avilla and V Fonseca (eds), *Direitos Humanos, Cidadania e Violência no Brasil; Estudos Interdisciplinares* (CRV 2018) 75.

³⁷JMG Wagner, 'Direitos Indígenas na Constituição Brasileira de 1988 (e outros ensaios)' (CIMI 1989).

³⁸On the history of the negotiations of indigenous peoples' constitutional rights, see *ibid*; and Pinto and de Resende (n 36).

³⁹Brazilian Constitution (n 33) art 20(11).

⁴⁰*ibid* art 231(4).

⁴¹*ibid* art 231.

⁴²*ibid* art 231(2).

⁴³*ibid* art 231(1).

⁴⁴Pinto and de Resende (n 36) 25.

⁴⁵Law 6.001 of 19 December 1973 (Law 6.001/73).

⁴⁶ILO Convention 169 (n 4) was ratified by 23 States at the time of writing. Virtually all Latin American States with large indigenous population have ratified the ILO Convention. Among the Amazon States, only Brazil, Colombia, Peru, and Venezuela have ratified the Convention. See <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>.

⁴⁷ILO Convention 169 (n 4) art 15(1)-(2).

natural resource rights by calling on States to ensure the conservation and protection of the environment and the productive capacity of their lands or territories and resources,⁴⁸ as well as the right to redress by means that can include restitution or (when this is not possible) just, fair and equitable compensation for lands, territories and resources which have been 'confiscated, taken, occupied, used or damaged'.⁴⁹ Although non-binding, some of the indigenous peoples' rights recognized under the UNDRIP are regarded to have evolved to customary international law status.⁵⁰ Several provisions recognizing indigenous land rights in the UNDRIP and ILO Convention 169 are largely replicated in the 2016 American Declaration on the Rights of Indigenous Peoples.⁵¹ The American Declaration states that indigenous peoples have 'the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'⁵² and that 'States shall give legal recognition and protection to these lands, rights and natural resources'.⁵³

Indigenous land rights are supervised and enforced in Brazil by the federal agency National Indigenous Foundation (FUNAI), yet the ability of FUNAI to effectively supervise and enforce indigenous rights has been compromised by continuous underfunding and political pressures, especially in recent years.⁵⁴ FUNAI also oversees the process of demarcation of indigenous lands in accordance with Article 67 of the Brazilian Constitution.⁵⁵ Yet the process of demarcation has not been able to prevent illegal invasions of indigenous lands.⁵⁶ Brazilian President Bolsonaro openly defends the mining of areas in the Amazon giving further impetus to illegal incursions into indigenous lands.⁵⁷ The government has proposed Bill 191/2020

which would allow mining in indigenous lands,⁵⁸ a practice which is presently prohibited – or subject to significant restrictions – under national law.⁵⁹

There is a strong socio-environmental case not only for maintaining but also increasing demarcation of indigenous lands. According to a 2021 study, almost half (45 per cent) of the remaining intact forests (large undegraded forest areas) in the Amazon Basin are in indigenous territories.⁶⁰ Demarcated indigenous lands represent 24 per cent of Brazil's Amazon biome, thus, protecting more than the 14 per cent that is in federal 'conservation units' (protected areas for biodiversity).⁶¹ In a notable example, the Kayapó land in the southwest region of the Brazilian Amazon inhabited by about 9,000 indigenous people is one of the largest protected areas of tropical rainforest in the world.⁶²

4 | THE DEVELOPMENT OF INDIGENOUS PEOPLES' RIGHTS TO PARTICIPATION AND TO FREE, PRIOR AND INFORMED CONSENT

4.1 | The right to consultation in the context of development activities

Indigenous peoples' participatory rights have evolved incrementally in the past three decades through particular international declarations and treaties recognizing the rights of indigenous peoples. These rights have been further consolidated in multilateral environmental treaties and declarations, including those envisaging participatory 'access rights' (i.e. access to justice, to public participation in decision making and to environmental information), which are based on Principle 10 of the 1992 Rio Declaration on Environment and Development.⁶³ Most recently, such rights were incorporated in the Escazú Agreement adopted under the auspices of the UN Economic Commission for Latin America and the Caribbean.

The right to consultation is enshrined in the ILO Convention 169, which employs different standards ranging from consultation to participation and, in the case of relocation, informed consent. According to Article 6(2) of ILO Convention 169, consultation must be undertaken 'in good faith ... in a form appropriate to the circumstances,

⁴⁸ibid art 29(1).

⁴⁹ibid art 28(1).

⁵⁰See K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141. See also K Engle, *The Elusive Promise of Indigenous Development* (Duke University Press, 2010). A Montes and G Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United States Declaration on the Rights of Indigenous Peoples* (Transaction Publisher/Central Books 2009) 138.

⁵¹Organization of American States (OAS), 'American Declaration on the Rights of Indigenous Peoples' AG/RES.2888 (XLVI-O/16) (15 June 2016) <https://www.iitc.org/wp-content/uploads/AG07150E06_web.pdf>.

⁵²ibid art XXV(2).

⁵³ibid art XXV(4).

⁵⁴D Phillips, 'Bolsonaro Picks for Funai Agency Horrifies Indigenous Leaders' (The Guardian, 21 July 2019).

⁵⁵Brazilian Constitution (n 33) art 67. According to FUNAI, at present 488 indigenous lands have been demarcated, representing 12.2 percent of the national territory: <<http://www.funai.gov.br/index.php/nossas-acoas/demarcacao-de-terras-indigenas?limitstart=0#>>.

⁵⁶J Plummer, 'The Yanomami: Illegal Mining, Law, and Indigenous Rights in the Brazilian Amazon' (2017) 27 *Georgetown International Environmental Law Review* 479. On the implications of REDD+ projects to indigenous land rights in the Brazilian Amazon, see B García et al, 'REDD+ and Forest Protection on Indigenous Lands in the Amazon' (2021) 30 *Review of European, Comparative and International Environmental Law*.

⁵⁷See International Work group for Indigenous Affairs, 'Indigenous Peoples in Brazil' <<https://www.iwgia.org/en/brazil.html>>.

⁵⁸Bill 191 of 2020.

⁵⁹See Section 4.

⁶⁰Food and Agriculture Organization of the United Nations (FAO) and Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, 'Forest Governance by Indigenous and Tribal Peoples. An Opportunity for Climate Action in Latin America and the Caribbean' (FAO 2021) <<https://doi.org/10.4060/cb2953en>>.

⁶¹Ferrante and Fearnside (n 7).

⁶²K Taylor, 'Improving Substantive and Procedural Protections for Indigenous Rights in REDD+ Projects: Possible Lessons from Brazil' (2015) 5 *Journal of Sustainable Development Law and Policy* 32.

⁶³Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Principle 10.

with the objective of achieving agreement or consent'.⁶⁴ Under the Convention, States must also guarantee the protection of indigenous peoples' rights to natural resources throughout their territories, including their right 'to participate in the use, management and conservation' of the resources.⁶⁵ Participation at the broadest level of governance (including in national parliamentary debates) must not supplant local participation in connection with specific projects. This implies that national procedures regarding project approval and development – such as EIA and strategic environmental assessment – must recognize the right of consultation of indigenous peoples.⁶⁶ The UNDRIP also recognizes the right of indigenous peoples to participate in decision making in matters that could impact on their rights – through representatives chosen by themselves in accordance with their own procedures – as well as to maintain and develop their own indigenous decision-making institutions.⁶⁷ States should consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their FPIC⁶⁸ before adopting and implementing legislative or administrative measures that may affect them.⁶⁹ It is, thus, recognized in both ILO Convention 169 and the UNDRIP that consultation is an obligation when indigenous peoples' lands and resources imperatives are concerned.⁷⁰ In this vein, James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples (2008–2014), argues that the 'widespread acceptance of the norm of consultation demonstrates that it has become part of customary international law'.⁷¹

With the passage of Decree no. 5.051/2004,⁷² Brazil implemented ILO Convention 169, including by transposing the obligations of consultation and participation as well as FPIC in the context of certain developmental activities. In June 2012, the Brazilian congress passed the National Policy on Territorial and Environmental Governance/Management in Indigenous Lands' (PNGATI)⁷³ with the overall aim of advancing and securing indigenous consultation and participation in the planning stages of development projects. The PNGATI aims to improve the environmental governance and management on indigenous

lands and to 'guarantee and promote the protection, recovery, conservation and sustainable use of natural resources in Indigenous reserves and territories, assuring the integrity of indigenous patrimony, improvement of the quality of life, and proper conditions for the physical and cultural reproduction of actual and future generations of indigenous peoples, respecting their sociocultural autonomy'.⁷⁴ Two important concepts are introduced by this Decree: 'ethno-mapping' and 'ethno-zoning', which involve the indigenous participation in mapping of areas of environmental, socio-cultural and productive relevance for indigenous peoples based on their traditional knowledge.⁷⁵ From the perspective of participatory environmental governance, another important development was the passage of Law 13.123/2015 on Genetic Heritage, Protection and Access to Traditional Knowledge, which advances indigenous and local communities' participatory rights in the context of access and benefit sharing of genetic resources and the protection of indigenous traditional knowledge.⁷⁶ Moreover, according to an Inter-American Commission of Human Rights (IACoMHR) study, several consultation protocols have been developed with the help of civil society and the Federal Public Prosecutors' Office (*Ministerio Público Federal*), whereby indigenous and traditional peoples in Brazil themselves draw up protocols establishing their rules, forms of participation and decision making.⁷⁷

Public participation is also required in the course of environmental licensing procedures in accordance with CONAMA Resolution 237/97.⁷⁸ Unlike the PNGATI, the requirement of public participation in this resolution is not exclusive to indigenous peoples or traditional communities.⁷⁹ According to the resolution, public authorities may organize public hearings at their own initiative, if requested by a civil society organization (*entidade civil*), by the Office of the Prosecutor (*Ministerio Publico*) or by a minimum of 50 persons.⁸⁰ Furthermore, in the course of an EIA,⁸¹ it is obligatory for the community to be involved in the decision-making process; even if it is not represented by an NGO. Although in general the Brazilian environmental licensing procedure appears to meet international best practice standards, several problems emerge in connection with EIA follow-up and enforcement of provisions.⁸² According to a 2008

⁶⁴ILO Convention 169 (n 4) art 6(2).

⁶⁵*ibid* art 15(1); see R Pereira and O Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resources Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 Melbourne Journal of International Law 451.

⁶⁶See further Pereira and Gough (n 65).

⁶⁷UNDRIP (n 5) art 18.

⁶⁸B Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22 Arizona Journal of International and Comparative Law 41, 42.

⁶⁹UNDRIP (n 5) art 19.

⁷⁰J Anaya, 'Indigenous Peoples' Participatory Rights in relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 Arizona Journal of International and Comparative Law 7, 10–12.

⁷¹*ibid* 7.

⁷²Decree 5.051 of 19 April 2004 (Decree 5.051/2004). This Decree was repealed by Decree 10.088 of 5 November 2019 (Decree 10.088/2019), which aimed to consolidate in one legislative instrument the ILO conventions ratified by Brazil. The ILO Convention 169 appears in Annex LXXII of Decree 10.088/2019, and therefore the Convention remains in force in the Brazilian legal order.

⁷³Decree of 7.747 of 5 June 2012 (PNGATI).

⁷⁴*ibid*.

⁷⁵*ibid* art 2.

⁷⁶See Law 13.123 of 20 May 2015 (Law 13.123/2015). Brazil has not yet ratified the 2011 Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity.

⁷⁷Inter-American Commission on Human Rights (IACoMHR), 'Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region' (OAS 2019).

⁷⁸CONAMA Resolution 237 of 19 December 1997 (CONAMA Resolution 237/97) art 3.

⁷⁹'Traditional peoples and communities' are defined in the National Policy for Sustainable Development of Peoples and Traditional Communities, Decree 6.040 of 7 February 2007, art 3(1).

⁸⁰Under the terms of CONAMA Resolution 1 of 23 January 1986 and CONAMA Resolution 9 of 3 December 1987. See LP Sirvinskis, *Manual de Direito Ambiental* (12th edn, Saraiva 2014).

⁸¹Under CONAMA Resolution 237/97 (n 78) art 3, in addition to the EIA, a report of the environmental impacts needs to be produced containing a summary of the EIA.

⁸²P Hanna et al, 'Improving the Effectiveness of Impact Assessment Pertaining to Indigenous Peoples in the Brazilian Environmental Licensing Procedure' (2014) 46 Environmental Impact Assessment Review 58.

World Bank report that addressed the hydropower sector in Brazil, in practice 'problems include the poor quality of the EIAs submitted by project proponents, the subsequent uneven evaluation of the EIAs (by the Government), and the lack of a suitable dispute resolution'.⁸³

As regards extractive activities over subsoil energy and mineral resources in indigenous lands, the Brazilian Constitution guarantees that these cannot take place without the authorization of the National Congress, the consultation of indigenous peoples and their sharing of benefits arising from exploitation of those resources.⁸⁴ Therefore, Bill 191/2020⁸⁵ proposed by the current Brazilian government breaches constitutional guarantees as well as ILO Convention 169, which requires consultation and FPIC of indigenous peoples affected by extractive industry activities.⁸⁶

4.2 | From consultation to FPIC?

The extent of the duty of consultation that accrues to indigenous peoples has also been intensely debated at the international level. In particular, it has been contended that indigenous peoples' right to participation must include the right to veto decisions affecting them. The right of FPIC is a manifestation of the right of self-determination established under international law.⁸⁷ Self-government is recognized as an overarching political dimension to the right to (internal) self-determination. In this vein, the UNDRIP states that:

[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.⁸⁸

There is no agreed definition of FPIC under international law and practices vary considerably between States.⁸⁹ Although the right to

FPIC is currently invoked by virtually all international human rights bodies dealing with indigenous rights,⁹⁰ a large number of States take the view that indigenous peoples should not have the power to veto projects that are considered of strategic importance for the development of the country.⁹¹ In light of these difficulties, it has been suggested that FPIC should be comprehended and applied as a process of continuous engagement, rather than as a one-off mechanism to obtain approval to proceed, or 'consent'.⁹²

ILO Convention 169 generally falls short of requiring the prior and informed consent of indigenous peoples, instead requiring merely that consultations are carried out and establishing the right to participation in decision making. Yet in the event that a project or activity requires the relocation of the impacted indigenous communities, this can only take place as an exceptional measure and requires free and informed consent from indigenous peoples.⁹³ Other provisions within the Convention, although not establishing a legal requirement that consent be obtained, could be read as broadly requiring an element of participation of indigenous peoples with the view of 'achieving agreement or consent'.⁹⁴ Therefore, the State duty to give effect to the indigenous right to prior and informed consent is largely dependent on the nature of the substantive rights concerned. In certain areas, such as projects involving resettlement or relocation of indigenous communities, the use of traditional knowledge⁹⁵ and certain development-related activities affecting indigenous peoples' traditional lands,⁹⁶ international law requires not only that the right to consultation of indigenous peoples is followed but also that indigenous peoples have the right to give or withhold their consent.⁹⁷

When assessing the extent of the indigenous right to consultation and FPIC, the Inter-American human rights bodies have articulated a duty for States to obtain the consent of indigenous peoples when their property rights are at issue.⁹⁸ They have also

⁸³World Bank, 'Environmental Licensing for Hydroelectric Projects in Brazil: A Contribution to the Debate' (2008).

⁸⁴Brazilian Constitution (n 33) art 231(3). Other restrictions on mining in indigenous lands are present in the Indian Statute, Law 6.001/73 (n 45) art 20(1)(f), and Decree 88.985 of 10 November 1983, art 5, which permit exploitation of the subsoil in indigenous lands only in cases of great national interest, by federal public entities, after they have obtained the consent of the FUNAI and only when it is a matter of strategic minerals necessary for national security or development.

⁸⁵Bill 191 of 2020 (n 58). See Section 3 above.

⁸⁶ILO Convention 169 (n 4) art 16(2).

⁸⁷See Article 1(1) of both the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 1(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 1(1).

⁸⁸UNDRIP (n 5) art 4.

⁸⁹See, e.g., the World Bank, 'Operational Policy 4.10 (OP 4.10)' (July 2015). See further Clavero (n 68); M Satterthwaite and D Hurwitz, 'The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects' (2005) 22 *Arizona Journal of International and Comparative Law* 1; F MacKay, 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review' (2004) 4 *Sustainable Development Law and Policy* 43, 51.

⁹⁰For a detailed overview of the case law, see UN-REDD Programme, 'Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC): International Law and Jurisprudence Affirming the Requirement of FPIC' (January 2013).

⁹¹M Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 *International Journal of Human Rights* 1; and J Gilbert, *Natural Resources and Human Rights* (Oxford University Press 2018) 64–75.

⁹²Hanna et al (n 82).

⁹³ILO Convention 169 (n 4) art 16(2).

⁹⁴ibid art 6(2).

⁹⁵Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (adopted 29 October 2010, entered into force 12 October 2014) <<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>>.

⁹⁶See ILO Convention 169 (n 4) art 15(2) concerning the requirements for consultation in the context of extractive activities on indigenous lands.

⁹⁷Pereira and Gough (n 65). The requirement of FPIC is implemented in Brazilian law under the terms of the domestic legislation implementing ILO Convention 169, Decree 5.051/2004 (n 72), repealed by Decree 10.088 (n 72); as well as under PNGATI (n 73) art 4(3)(a) (in the context of processes for creation of conservation units affecting indigenous lands); and Law 13.123/2015 (n 76) art 9 (in the context of access to indigenous traditional knowledge).

⁹⁸IAComHR, *Maya Indigenous Communities of the Toledo District v Belize*, OEA/Ser.L/V/II.122 (12 October 2004) para 5.

found that indigenous peoples' right to FPIC exists on the basis of traditional land tenure.⁹⁹ Thus, the Inter-American Court of Human Rights has articulated a link between the right to consultation and full and informed consent and the right to property recognized in Article 21 of the American Convention on Human Rights.¹⁰⁰ It should be noted that the Inter-American Court has also articulated a connection and interdependency between indigenous peoples and the human right to a healthy environment.¹⁰¹

In the first case brought against Brazil before the IACoHR for widespread violations of indigenous peoples' rights in the country,¹⁰² the *Yanomami* case, the Commission studied the situation of the Yanomami people as a consequence of the devastating effects caused by the construction of a highway in their ancestral territory, which spurred access and invasion by illegal settlers and *garimpeiros*. The Commission found that Brazil violated the American Declaration of the Rights and Duties of Man and identified violations of the basic human rights of the indigenous peoples' members, including the rights to life and security. The subsequent process of demarcation of Yanomami land has been fraught with problems, resulting in a number of separate and disjointed areas and a lack of governmental protection.¹⁰³ In the *Xucuru* case, the Inter-American Court found, for the first time in a case brought against Brazil, violations of the American Convention on Human Rights for violations of indigenous peoples' rights. In particular, the Court held that the process of demarcation and registration of indigenous lands needed to conform to the Xucuru peoples' own forms of decision making, values, uses and customs.¹⁰⁴ Moreover, the Court found that the lengthy administrative process of

titling, demarcating and reorganizing of the Xucuru peoples was partly ineffective.¹⁰⁵

Therefore, to build trust relationships with the impacted communities with a view to reaching meaningful consultation and FPIC,¹⁰⁶ a human rights impact assessment framework should be applied in Brazil. Such a framework should be aimed at ensuring that projects designed to expand access to natural resources are conceived, planned and implemented with the objective of protecting, respecting and fulfilling human rights.¹⁰⁷ Accordingly, achieving and maintaining a social license to operate needs to involve an ongoing process of community engagement in the country, especially in the context of economic activities in the Amazon or that affect other sites of national and international ecological importance.¹⁰⁸ Although the HRIA framework does not in itself introduce new legal obligations beyond Brazil's existing obligations already accepted pursuant to human rights and environmental treaties, it would enable the country and project developers to comply *ex ante* with its existing international law obligations by fully implementing human rights risk assessment processes.¹⁰⁹ Although non-binding, Brazil implemented the 2011 UN Guiding Principles on Business and Human Rights¹¹⁰ via domestic legislation in the form of Decree no. 9.571/2018.¹¹¹ As was noted above, the UN Guiding Principles incorporate the principle of due diligence in corporate decision making when assessing human rights impacts of projects. The UN Guiding Principles are at present the leading authority for implementation of an HRIA framework globally.¹¹²

5 | CASE STUDY: THE BELO MONTE DAM PROJECT

Renewable energy makes up a considerable proportion of Brazil's energy mix, with a high proportion of biofuels deployed in the transport sector and hydropower used for electricity generation. As for hydroelectric power, the environmental and social impacts can be considerable, as seen in the context of the controversial Belo Monte dam.¹¹³ The Belo Monte project highlights the significant challenges

⁹⁹*Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (31 August 2001) paras 25 and 173(2).

¹⁰⁰ACHR (n 3) art 21. See further on the Inter-American Court of Human Rights addressing violations of indigenous peoples' human rights in the context of extractive industry projects: *Kichwa Indigenous People of Sarayaku v Ecuador*, Merits and Reparations, Inter-American Court of Human Rights Series C No 245 (27 June 2012); *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 172 (28 November 2007); *Moiwana Community v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 124 (15 June 2005). For an analysis of the Inter-American Court and Inter-American Commission jurisprudence see, e.g., T Antkowiak and A Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017); and L Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Expense of Unity of International Law' (2010) 21 *European Journal of International Law* 585.

¹⁰¹IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) paras 47 and 108. See also *Lhaka Honhat Association (Our Land) v Argentina*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 400 (6 February 2020).

¹⁰²*Yanomami v Brazil*, OEA/Ser.L/VII.66 (Doc 10 rev.1) (5 March 1985).

¹⁰³Plummer (n 56).

¹⁰⁴*Xucuru Indigenous People and its Members v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 346 (5 February 2018) para 115.

¹⁰⁵*ibid* para 162. See further J Bendel and T Stephens, 'Turning to International Litigation to Protect the Amazon?' (2021) 30 *Review of European, International and Comparative Environmental Law*; and GCB Navarro, 'The Judgement of the Case Xucuru People v Brazil: Inter-American Court of Human Rights between Consolidation and Setbacks' (2019) 16 *Revista de Direito Internacional* 203.

¹⁰⁶Hanna and Vanclay (n 8).

¹⁰⁷Shelton (n 9).

¹⁰⁸Olawuyi (n 9).

¹⁰⁹*ibid*.

¹¹⁰OHCHR (n 10).

¹¹¹National Directives on Business and Human Rights, Decree 9.571 of 21 November 2018 (Decree 9.571/2018).

¹¹²See in particular OHCHR (n 10) Principles 4, 15(b) and 17. See also the ongoing negotiations of the United Nations Draft Business and Human Rights Treaty, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>

¹¹³See A de la Totte et al, 'Low Carbon, High Growth: Latin American Responses to Climate Change: Overview' (World Bank 2009).

in reconciling the Brazilian government's national energy security and economic growth strategies with the quest to safeguard human rights and environmental justice for the local and indigenous communities who are dramatically impacted by large-scale infrastructure in the Amazon. This is one example of areas in which land-use change, planning and climate change policies could be better integrated.

The first plans for construction of the Belo Monte hydroelectric power project in the river Xingu, in the state of Para, dates back to 1975, and was met with considerable resistance.¹¹⁴ The Belo Monte dam is the third largest hydroelectric power project in the world,¹¹⁵ which highlights the significant scale of the project and its actual and potential risks and harmful impacts. The project was finally given approval by Brazil's Environment Agency, the Brazilian Institute of Environment and Natural Resources (IBAMA) in 2005,¹¹⁶ yet without previous consultation with local and indigenous communities.¹¹⁷ Although the dam itself is not located within demarcated indigenous lands, it directly affects the indigenous peoples in the surrounding 11 indigenous lands, including by affecting their navigational rights, access to resources in the Xingu River and in some cases leading to their forced removal due to flooding and to harmful impacts on the environment.¹¹⁸ Moreover, the Belo Monte project has caused substantial harm to sacred sites of the Mundurucu people. For the Mundurucu, the destruction of those sacred places harms not only their cultural and spiritual survival but also the survival of all forms of life in the forest.¹¹⁹

One of the main criticisms surrounding the construction of the Belo Monte dam is that it lacked effective participation of the indigenous and local communities impacted by the project. In fact, it has been noted that approval was granted 3 years before publication of the EIA, and no consultations with indigenous peoples were ever carried out by the Brazilian Congress.¹²⁰ As was noted by Fearnside, the environmental study and licensing procedure of the Belo Monte project amounted to 'mere bureaucratic rubber stamps' to legalize a decision that had already been made by the (federal) government.¹²¹

Following IBAMA's decision on June 2011 to give the final permission for the construction of the Belo Monte dam, on 14 August 2011 the Federal Tribunal of Brazil's Amazon region again suspended

all work, invalidating the project's environmental and installation licenses, claiming that no consultations were held with indigenous people prior to Congress issuing the authorization Decree 788 in 2005. However, on 27 August 2011 – hence just 2 weeks after the Regional Federal Court revoked the projects' licence – Brazil's Supreme Court ordered that the work on the Belo Monte dam could resume.¹²² There were delays in finalizing the building of the dam due to the conflicts of interest involved.¹²³ At least 20,000–40,000 people (including over 1,400 indigenous peoples) were forced to move from the area surrounding the Xingu River.¹²⁴ In January 2016, the Federal Court in Altamira, state of Para, suspended the dam's licence for lack of compensation to the communities affected by the project.¹²⁵ Moreover, in another setback to the project developers, another court order was issued in April 2017 suspending the license of the dam due to lack of appropriate sanitation. The court noted that Norte Energia – the consortium responsible for construction of the dam – was required to provide adequate sanitation as per the terms of its environmental licence.¹²⁶

In addition to litigation before the Brazilian courts, there has been international oversight of the Brazilian government's failure to guarantee indigenous and local communities' rights affected by the Belo Monte project. A significant development in this regard happened in April 2011 when the IACoMHR granted precautionary measures for the members of the indigenous communities of the Xingu River Basin in Pará. The Commission requested Brazil to immediately suspend the licensing process for the Belo Monte project and stop any construction work until certain minimum conditions were met.¹²⁷ Moreover, the Commission ordered Brazil: (i) to conduct consultation processes, in fulfilment of its international obligations – including 'prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement – in relation to each of the affected indigenous communities that are beneficiaries of these precautionary measures'; and (ii) to guarantee that, 'in order for this to be an informed consultation process, the indigenous communities have access beforehand to the project's Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages'.¹²⁸ Despite the strong condemnation by the IACoMHR of the

¹²²ibid.

¹²³A Villas-Boas, 'A Usina de Belo Monte é Boa para o Brasil?' (Folha de São Paulo, 21 December 2013).

¹²⁴Elbus and Kuijpers (n 114) 137. See further, IB de Lima et al, 'Hydroelectric Plants Construction, Rainforest Landscape Change, and Impacts on Indigenous, and Traditional Groups in Amazonia: From Balbina, Tucuruí to Belo Monte Context' in Leal Filho et al (n 1) 397.

¹²⁵J Watts, 'Belo Monte Dam Operations Delayed by Brazil Court Ruling on Indigenous People' (The Guardian, 15 January 2016).

¹²⁶Brazil Court Suspends Belo Monte Dam Operating License over Sanitation' (Reuters, 7 April 2017). By late 2018, over 60 cases were pending before the Brazilian courts, see: AIDA (Associação Interamericana para Defesa Ambiental), 'Caso Belo Monte Brasil' (August 2018) <<https://aida-americas.org/es/recurso/belo-monte-expediente-de-fatos-do-caso>>.

¹²⁷IACoMHR, Precautionary Measures (PM 382/10), *Indigenous Communities of the Xingu River Basin, Pará, Brazil* <<http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>>.

¹²⁸ibid.

¹¹⁴See further B Elbus and K Kuijpers, 'The State-Corporate Tandem Cycling Towards Collision: State-Corporate Harm And The Resource Frontiers Of Brazil And Colombia' in A Brisman, N South and R White (eds), *Environmental Crime and Social Conflict: Contemporary and Emerging Issues* (Routledge 2015) 125.

¹¹⁵ibid 136.

¹¹⁶Legislative Decree 788 of 14 July 2005.

¹¹⁷See further M Moreno Vasconcelos Araujo, K de Jesus Pinto and F de Oliveira Mendes, 'The Belo Monte Plant and Impacts on Indigenous Lands' (2014) 6 *Planeta Amazônia: Revista Internacional de Direito Ambiental e Políticas Públicas* 43.

¹¹⁸Human Rights Council 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil' UN Doc A/HRC/33/42/Add.1 (8 August 2016) para 43; and J Watts, 'Poorly Planned Amazon Dam Project Poses serious Threat to Wildlife' (The Guardian, 8 November 2019).

¹¹⁹IACoMHR (n 77).

¹²⁰Hanna et al (n 82).

¹²¹Fearnside (n 14).

standards of consultation and public participation in the planning process of the Belo Monte dam, the Brazilian government reacted defensively suggesting that it would not comply with the IACoHR order for provisional measures.¹²⁹ As a consequence, on 21 December 2015, the IACoHR opened the main infringement proceedings against Brazil for violations of the Inter-American Convention.¹³⁰ Although at the time of writing the IACoHR has not released a decision, it is likely that the Commission's decision will be of limited effect as a measure or redress which ultimately reflects the limitations of human rights courts and commissions in addressing conflicts in a timely manner (despite the increasing use by the Commission of 'precautionary measures', as illustrated in the Belo Monte case).¹³¹ This is because the construction of the dam was completed and it became operational after November 2019,¹³² leaving the affected communities with few available remedies apart from compensation and reparations for their past and present human rights violations.

Further international scrutiny of the Brazilian government policies in the context of the Belo Monte project happened following the mission of the former UN Special Rapporteur for Indigenous Peoples, Victoria Tauli-Corpuz (2014–2020) to Brazil in 2016. The Special Rapporteur expressed concerns over reports that public hearings on the project were grossly inadequate compared with the standard of consultation provided for in ILO Convention 169 and the UNDRIP.¹³³ In particular, she was informed that no efforts had been made to obtain their FPIC, and no opportunities had been provided for their participation in decision making. Moreover, the current IACoHR Special Rapporteur on the Rights of Indigenous Peoples, Antonia Urrejola Noguera, following her visit to Brazil in 2018, urged the Brazilian government to address and quickly resolve repeated violations of the human rights of indigenous communities, highlighting the case of the Miratu de Paquicamba indigenous community affected by the environmental damage caused by the construction of the Belo Monte dam.¹³⁴

Redress by local and indigenous communities was also sought under the ILO Convention 169 Committee of Experts on the Application of Conventions and Recommendations (Compliance Committee), which was asked to intervene in the situation regarding the construction of the Belo Monte dam. The ILO Compliance

Committee noted in its recommendations to the Brazilian government in 2011 that¹³⁵ 'the hydroelectric project could have consequences such as alteration of the navigability of rivers, flora and fauna and climate, that affect the peoples living on the lands where the project will be located, and which go further than the flooding of lands or the displacement of the peoples concerned'.¹³⁶ The Committee asked the Brazilian government 'to take the necessary steps to carry out consultations with the indigenous peoples affected, in accordance with Articles 6 and 15 of the Convention'.¹³⁷

The Belo Monte dam case study is a telling example of how a HRIA framework ought to have been integrated into project development stages in Brazil, so as to ensure that projects are designed, planned and implemented with a view to reducing environmental impacts and protecting indigenous and local communities' fundamental rights.¹³⁸ This includes, among other measures, establishing effective grievance processes and remedies which are accessible to indigenous and local communities, in line with Principles 25–31 of the UN Guiding Principles and the premises of Decree 9.571/2018 on business and human rights.¹³⁹ A human rights-based approach would have added emphasis on participation in terms of questioning, broadening the points in time at which participation occurs, the level of information sharing involved in participation and consultation activities and empowerment and capacity building of local and indigenous communities.¹⁴⁰ Therefore, a HRIA framework would allow the rights to consultation and FPIC to be exercised in a manner that protects and aims to give effect to human rights.

6 | LESSONS FROM OTHER AMAZON STATES AND THE PROSPECTS FOR STRENGTHENING INDIGENOUS PARTICIPATORY RIGHTS AFTER THE ADOPTION OF THE ESCAZÚ AGREEMENT

From the perspective of regional participatory environmental governance, a landmark development happened in 2018 with the adoption of the Escazú Agreement, which entered into force in April 2021. However, Brazil is not 1 of the 12 countries to have ratified the Escazú Convention to date,¹⁴¹ and it is unlikely that the country will ratify the treaty in the immediate future under the country's current administration. Notwithstanding Brazil's non-participation and the

¹²⁹'Brazil Rejects Request To Halt Belo Monte Dam In Amazon' (BBC News, 6 April 2011).

¹³⁰Amazon Watch, 'IACHR Opens Case against Brazil For Human Rights Violations Related To Belo Monte Dam' (7 January 2016) <<https://amazonwatch.org/news/2016/0107-iachr-opens-case-against-brazil-for-human-rights-violations-related-to-belo-monte-dam>>.

¹³¹See, e.g., IACoHR (n 127).

¹³²T Higgins, 'Belo Monte Boondoggle: Brazil's Biggest, Costliest Dam May Be Unviable' (Mongabay, 17 January 2020).

¹³³Report of the Special Rapporteur on the Rights of Indigenous Peoples (n 118) para 40.

¹³⁴See AIDA, 'Inter-American Commission Urges Brazil to Address Damages Caused to Indigenous Peoples Caused by Belo Monte Dam' (13 November 2018) <<https://aida-americas.org/en/press/inter-american-commission-urges-brazil-address-damages-to-indigenous-peoples-caused-by-belo-monte>>.

¹³⁵Observation (CEACR), Adopted 2011, Published 101st ILC session (2012), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Brazil (Ratification: 2002), Follow-up to the Recommendations of the Tripartite Committee' <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2700476>.

¹³⁶*ibid.*

¹³⁷*ibid.*

¹³⁸Shelton (n 9); Olawuyi (n 9).

¹³⁹Decree 9.571/2018 (n 111), in particular arts 8(10), 9(7) and 11-13.

¹⁴⁰Danish Institute for Human Rights (n 12).

¹⁴¹At the time of writing the agreement has attracted 12 ratifications (Antigua and Barbuda, Argentina, Bolivia, Ecuador, Guyana, Mexico, Nicaragua, Panama, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Uruguay).

slow process of ratifications of the treaty to date, the Escazú Agreement has been lauded as a landmark treaty for advancing environmental rights – in particular, environmental ‘access rights’ – in the region, and potentially beyond.¹⁴²

The structure of the Escazú Agreement resembles that of the Aarhus Convention.¹⁴³ Article 4 includes general provisions, which is followed by three articles addressing more specifically access to and generation and dissemination of environmental information, public participation and access to justice.¹⁴⁴ Unique to the Agreement is its Article 9 on the protection of human rights and environmental defenders, a significant challenge facing indigenous and other environmental and human rights defenders in Brazil and Latin America more broadly.¹⁴⁵

Only two articles of the agreement explicitly address indigenous peoples. The right of indigenous and vulnerable groups to access to environmental information is recognized in Article 5(4), which states that ‘[e]ach Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response’.¹⁴⁶ Moreover, according to Article 7(15) ‘[i]n the implementation of the present Agreement, each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities are observed’.¹⁴⁷ Other provisions of the agreement have direct relevance to indigenous peoples and traditional groups, although not applicable exclusively to them. For example, Article 7(11) states that ‘[w]hen the primary language of the directly affected public is different to the official languages, the public authority shall ensure that means are provided to facilitate their understanding and participation’.¹⁴⁸ Moreover, Article 7(16) states that ‘[t]he public authority shall make efforts to identify the public directly affected by the projects or activities that have or may have a significant impact on the environment and shall promote specific actions to facilitate their participation’.¹⁴⁹ Article 7 (9) of the Agreement further establishes standards for the dissemination of decisions resulting from ‘environmental impact assessments and other environmental

decision-making processes in which the public has participated’, which ‘shall be carried out through appropriate means’ and according to ‘written, electronic and oral means and customary methods, in an effective and prompt manner’.¹⁵⁰ Yet the Escazú Agreement has been criticized for not explicitly exploring other important issues pertinent to indigenous peoples, in particular with regard to the right of FPIC, which could have been included under Article 7 concerning public participation in environmental decision making.¹⁵¹

Although Brazil is not a party to the Escazú Agreement, domestic law incorporates the principles of public participation and consultation, for example, in the context of environmental licensing and EIA procedures. In addition, the right of citizens to request environmental information from public authorities envisaged in Article 7 of the Escazú Agreement is also recognized under Brazilian domestic law. The constitutional requirement for access to environmental information in Article 5(33) of the Brazilian Constitution¹⁵² is implemented by Law 9.985/2000, which states that the public administration must provide adequate and clear information to the local population.¹⁵³ Moreover, this legislation requires that environmental licensing be given due publicity.¹⁵⁴ The National Environmental Policy Act creates a national environmental information system, which aggregates all relevant policy and project-related information with environmental relevance.¹⁵⁵ In addition, the 2003 Access to Environmental Information Act¹⁵⁶ guarantees public access to information and data from environmental authorities and agencies. The Act is complemented by the 2011 Freedom of Information Law, which guarantees access to information retained by any public agency or authority.¹⁵⁷ Therefore, Brazilian legislation is broadly in line with the requirements of Article 7 of the Escazú Agreement as well as with the jurisprudence of the Inter-American Court of Human Rights.¹⁵⁸ Especially with regard to access rights which are already embedded in Brazilian environmental law, the added value of the Escazú Agreement stems from the mechanisms for implementation and compliance envisaged in the treaty,¹⁵⁹ and the fact that its adoption makes those participatory environmental rights less vulnerable to domestic political changes.

¹⁴²See S Stec and J Jendroska, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) 31 *Journal of Environmental Law* 533; R Caddell, ‘A Tale of Two Cities: Almaty, Escazu and the International Impacts of the Aarhus Convention’ in A Ryall and G Jones (eds), *The Aarhus Convention: Coming of Age?* (Hart fc); BO Giupponi, ‘Fostering Environmental Democracy in Latin America and the Caribbean: An Analysis of the Regional Agreement on Environmental Access Rights’ (2019) 28 *Review of European, Comparative and International Environmental Law* 136.

¹⁴³Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 29 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

¹⁴⁴See also L de Silva, ‘Escazú Agreement 2018: A Landmark for the LAC Region’ (2018) 2 *Chinese Journal of Environmental Law* 93.

¹⁴⁵OHCHR, ‘Brazilian Environmental Rights Defenders Fight for Recognition and Justice’ (29 March 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/BrazilianEnvironmentaIDefenders.aspx>>.

¹⁴⁶Escazú Agreement (n 13) art 5(4).

¹⁴⁷*ibid* art 7(15).

¹⁴⁸*ibid* art 7(11).

¹⁴⁹*ibid* art 7(16).

¹⁵⁰*ibid* art 7(9).

¹⁵¹Stec and Jendroska (n 142).

¹⁵²See PA Leme Machado, *Direito a informacao e Meio Ambiente* (Malheiros 2006).

¹⁵³Law 9.985 of 18 July 2000 establishing a National System of Protected Areas, art 22(3).

¹⁵⁴*ibid* art 33; Decree 4.340 of 22 August 2002, art. 5.

¹⁵⁵National Environmental Policy, Law 6.938 of 31 August 1981, art 10(1). See further DN Cassuto and RSR Sampaio, ‘The Importance of Information and Participation Principles in Environmental Law in Brazil, the United States and Beyond’ (2013) 22 *Review of European Community and International Environmental Law* 68.

¹⁵⁶Law 10.650 of 16 April 2003.

¹⁵⁷Law 12.527 of 18 November 2011.

¹⁵⁸See, e.g., *Claude Reyes et al v Chile*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 151 (19 September 2006).

¹⁵⁹See Escazú Agreement (n 13) art 18, establishing the Committee to Support the Implementation and Compliance which shall be ‘of a consultative and transparent nature, non-adversarial and non-punitive’ nature.

In contrast to Brazil's legal framework for indigenous participation, in Colombia the right to prior consultation appears in several pieces of domestic legislation dealing with both environmental and indigenous law.¹⁶⁰ Under Law 21/1991 implementing ILO Convention 169, the government shall 'consult the peoples concerned, whenever legislative or administrative measures may directly affect [indigenous peoples]'.¹⁶¹ Furthermore, according to Colombia's General Environmental Law (Law 99/1993), the exploitation of natural resources and development of indigenous lands cannot occur without prior consultation with the affected indigenous and Afro-Colombian communities.¹⁶² Although both Colombia and Brazil have afforded protection to indigenous rights in their constitutions,¹⁶³ the Colombian Constitutional Court has routinely upheld the commitment to indigenous rights by consistently declaring domestic laws unconstitutional if they do not make effective indigenous peoples' fundamental right to participate in decisions that affect their community.¹⁶⁴ Moreover, the Colombian Constitutional Court has recently released a progressive and ground-breaking ruling recognizing legal personality and the fundamental right of nature to access to justice.¹⁶⁵ Brazil's land tenure protections could be modelled on Colombia's, in which indigenous landholding has contributed to the high proportion of private forest ownership.¹⁶⁶ As was noted above, Brazil's public ownership regime over indigenous lands under the supervision of FUNAI has largely failed to protect indigenous peoples' property and fundamental rights. Yet despite the stronger judicial protection and legal framework, this has not prevented major human rights violations against indigenous peoples taking place in the context of the Colombian armed conflict.¹⁶⁷ In particular, projects have been implemented with brutal forced displacement, mass violence and selected killings of indigenous and Afro-Colombian communities and have led to significant increases in deforestation in the country, with cattle ranching and illegal timber extraction among its main causes.¹⁶⁸ More recently, on October 2020, the IACoHR referred a case to the Inter-American Court of Human Rights after finding that

the State failed to ensure effective protection of the U'wa's Indigenous Peoples and its members following the execution of a series of oil, mining, tourism and infrastructure activities in their lands.¹⁶⁹

Peru is another Amazon State that has also adopted a comprehensive codification of the rights and duties relating to FPIC with indigenous groups.¹⁷⁰ The 2011 Right to Prior Consultation with Indigenous or Tribal Peoples Law¹⁷¹ implements the ILO Convention 169's prior consultation requirement. Article 2 of the law grants indigenous groups the right to be consulted about legislative or administrative measures that may affect them, especially those that 'directly affect their collective rights concerning their physical existence, cultural identity, quality of life or development'.¹⁷² Under the General Environmental Act (Law 28611/2005), public authorities are required to promote the participation of indigenous groups and to involve them in decision making regarding their environment.¹⁷³ Although the right to prior consultation was passed into Peruvian law in 2011 in compliance with ILO Convention 169, a significant shortcoming is that the right to prior consultation does not entail the right to consent, as the government makes a final decision if an agreement with indigenous groups is not reached.¹⁷⁴ Moreover, Peru – like other countries in the region – is yet to find an appropriate balance between environmental protection and economic development. For example, some domestic laws have created exemptions for oil and gas companies from conducting EIAs.¹⁷⁵

Beyond the experiences of other Amazon States, several other countries have developed successful frameworks for strengthening indigenous peoples' participatory rights in project development and FPIC which could be emulated by Brazil. This includes Canada's indigenous-driven mechanisms implementing FPIC, State-driven consultation and industry-driven Impact and Benefit Agreements in the context of mining policies.¹⁷⁶ This has led to transformative changes and positive improvements in community engagement in different stages of project development.¹⁷⁷

7 | CONCLUDING REMARKS

This article has argued that integrating a human rights-based framework into EIA and licensing procedures could have a significant and

¹⁶⁰Tigre and Slinger (n 1).

¹⁶¹Law 21 of 6 March 1991, art 6.

¹⁶²Law 99 of 22 December 1993, art 76.

¹⁶³Taylor (n 62).

¹⁶⁴See, e.g., Constitutional Court of Colombia, judgments in cases SU-039/97 and C-123/14.

¹⁶⁵In its judgement in case T-622/16, para 10.2(1), the Colombian Constitutional Court recognized the Atrato River as a legal subject with rights to protection and restoration by the Colombian State and the local communities.

¹⁶⁶Taylor (n 62).

¹⁶⁷As regards indigenous peoples' access to justice rights in the context of the armed conflict in Colombia, see the decisions of the Special Jurisdiction for Peace in: Case 02, Territorial Situation of the Tumaco, Ricaurte, and Barbacoas Municipalities (Nariño), Auto SRVT-Caso 002-070 (12 November 2019); and Case 05, Territorial Situation of the Northern Cauca and Southern Cauca Valley Regions, Auto SRVR-Caso 005-002 (17 January 2020). See further <<https://www.jep.gov.co/especiales1/macrocasos/02.html>> and <<https://www.jep.gov.co/especiales1/macrocasos/05.html>>.

¹⁶⁸The Office of the Prosecutor, International Criminal Court, 'Interim Report: Situation in Colombia' (November 2012); L Morales, 'La Paz y La Protección Ambiental en Colombia: Propuestas para un Desarrollo Rural Sostenible' (2017) <https://www.thedialogue.org/wp-content/uploads/2017/01/Envnt-Colombia-Esp_Web-Res_Final-for-web.pdf>.

¹⁶⁹See OAS, 'IACHR Refers Case on Colombia to the Inter-American Court' (30 October 2020) <https://www.oas.org/en/iachr/media_center/PReleases/2020/261.asp>.

¹⁷⁰Tigre and Slinger (n 1).

¹⁷¹Law 29785, 21 August 2011.

¹⁷²*ibid* art 2.

¹⁷³General Environmental Act, Law 28611, 15 October 2005, art 70.

¹⁷⁴CAM Soria Dall'Orso, 'Increased Relevance and Influence of Free Prior Informed Consent, REDD, and Green Economy Principles on Sustainable Commons Management in Peru' (2015) 5 *Journal of Sustainable Development Law and Policy*.

¹⁷⁵*ibid*.

¹⁷⁶See M Papillon and T Rodon, 'Transformative Potential of Indigenous-Driven Approaches to Implementing Free, Prior and Informed Consent: Lessons from Two Canadian Cases' (2019) 27 *International Journal on Minority and Group Rights* 314.

¹⁷⁷*ibid*.

positive effect on project development in the Amazon with the view of safeguarding the protection of the environment and reducing the risks of human rights violations. It is unfortunate that with the election of the current Brazilian federal government those fundamental and environmental rights have been strained to their limits, including through the adoption of regressive laws and policies and budget cuts to key indigenous and environmental law enforcement bodies and agencies, which have significantly contributed to recent increases in deforestation rates in the Amazon. However, there have been some important advances in recent years in the country, which could form the basis for integrating a human rights assessment framework into project development, in particular with the passage of Decree 9.571/2018 implementing the UN Guidelines on Business and Human Rights. Moreover, with the prospects of ratification of the Escazú Agreement, Brazil, – and other countries in the region – would also go a long way in ensuring that participatory governance is fully embedded into national environmental laws in a form less vulnerable to changes in the political and economic landscapes.

The high rates of deforestation and major human rights violations committed against indigenous communities in the Amazon represent the more extreme examples of bad governance of the current administration. It falls on the national judiciary and international and regional human rights bodies to continue to play their part in acting as a check on the executive powers of the administration, if not to halt, at least to making a significant contribution in reducing the negative environmental and human rights impacts of developmental project activities in the Brazilian Amazon.

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I am grateful to Beatriz Garcia for valuable comments and insightful feedback on earlier drafts of this article. I also thank two anonymous referees for their helpful comments, which have served to improve the final manuscript. The usual disclaimer applies.

How to cite this article: Pereira R. Public participation, indigenous peoples' land rights and major infrastructure projects in the Amazon: The case for a human rights assessment framework. *RECIEL*. 2021;00:1–13. <https://doi.org/10.1111/reel.12400>